No. 82-1658

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA,
Petitioner,

v.

WASHINGTON GAS LIGHT COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF OF *AMICUS CURIAE* GAS RESEARCH INSTITUTE IN OPPOSITION

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I

STATEMENT OF INTEREST OF *AMICUS CURIAE* AND STATEMENT OF THE CASE

Gas Research Institute ("GRI") hereby respectfully submits its brief, as *amicus curiae*, in opposition to the Petition by the Public Service Commission of the District of Columbia ("Petitioner") for a Writ of Certiorari to the District of Columbia Court of Appeals. GRI has obtained written consent to the filing of the instant brief from all of the parties to this proceeding.

GRI is an organization created to plan and carry out research and development ("R&D") on behalf of, and as

agent for, its members in the natural gas industry. That membership includes, among others, 29 interstate pipeline companies whose transportation and sales for resale of natural gas in interstate commerce are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act.[1]

The FERC reviews GRI's R&D program annually in order to determine whether the cost of such programs should be funded, in part, through the wholesale rates of the member pipeline companies subject to its jurisdiction. This "funding unit" component of wholesale rates constitutes the primary source of GRI's funding.

One of the central issues in the proceeding below was whether Petitioner must accept, as a reasonable operating expense to be reflected in the retail natural gas rates of Washington Gas Light Company ("WGL"), the GRI funding unit embedded in the rates charged to WGL by its interstate pipeline suppliers of natural gas. GRI's interest in this case was only indirect until Petitioner, in a radical, eleventh-hour departure from its prior theory of the case, attempted an attack on the jurisdiction of the FERC to approve GRI's R&D program and a wholesale natural gas rate increment to fund it. This attempt took the form of a collateral attack upon a final FERC order that had been affirmed by a United States circuit court of appeals.

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[1] 15 U.S.C. §§ 717-717w. References in this brief to the powers and prerogatives of the Federal Power Commission ("FPC") apply equally to its successor agency, the FERC.

A. The Colorado Case

On October 2, 1979, the FERC issued Opinion No. 64,[2] in which it approved GRI's third annual R&D program. The Public Utilities Commission of Colorado, having exhausted its administrative remedies before the FERC, appealed from that opinion to the United States Court of Appeals for the District of Columbia Circuit, asserting that: (1) since GRI is not a "natural gas company" within the meaning of the Natural Gas Act, the FERC has no jurisdiction over GRI, and lacked authority to entertain GRI's application for approval of its R&D program; and (2) the FERC was without authority, in an exercise of its ratemaking power under the Natural Gas Act, to approve the cost of an R&D program that included activities (e.g., efforts to solve production and environmental problems associated with substitute natural gas technology) over which it has no direct regulatory jurisdiction.

The United States Court of Appeals rejected these arguments and affirmed Opinion No. 64 in *Public Utilities Commission of the State of Colorado* v. *FERC*, 660 F.2d 821 (D.C. Cir. 1981). The Colorado Commission filed a petition with this Court for a writ of certiorari, in which Petitioner joined as amicus curiae. This Court denied certiorari. ___ U.S. ___, 102 S.Ct. 2009 (1982). The concept of FERC approval of a cooperative, industry-wide approach to R&D, as embodied in GRI's program, as well as the substance of that program, were thus vindicated through the full process of administrative scrutiny and judicial review prescribed by Congress in the Natural Gas Act.

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[2] Opinion No. 64, *Gas Research Institute*, Docket No. RP79-75, 9 F.E.R.C. ¶ ___ (October 2, 1979). Rehearing of Opinion No. 64 was denied by operation of law on November 30, 1979.

B. The Proceeding Below

In the proceeding below, Petitioner initially took the position that, as long as the issue of the FERC's jurisdiction to approve the GRI program and funding unit was pending before the United States Court of Appeals, the status of the funding unit would be uncertain. Petitioner concluded that it was not obligated to permit recovery of the challenged component of wholesale rates in WGL's retail rates.

After the *Colorado* decision was handed down, Petitioner filed a "Supplementary Memorandum" in the proceeding below. In its Memorandum, Petitioner urged the court to find that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Colorado* was "in error," that the FERC's Opinion No. 64 affirmed therein was a "legal nullity," and that Petitioner was, therefore, entitled to disregard *Colorado* in carrying out its responsibilities with respect to WGL's retail rates.

Petitioner thereby launched, for the first time, a direct attack upon the jurisdiction of the FERC. GRI, which had not, theretofore, sought to participate in the proceeding below, but whose very existence had suddenly been placed at risk by the drastic new turn in Petitioner's theory of the case, sought, and was granted, leave to respond to Petitioner's Supplementary Memorandum as *amicus curiae*.

In its opinion below, *Washington Gas Light Co.* v. *Public Service Commission of the District of Columbia*, 452 A.2d 375 (D.C. App. 1982), the District of Columbia Court of Appeals dealt summarily with the matters raised in Petitioner's Supplementary Memorandum:

> [W]e decline PSC's invitation to rule that the United States Court of Appeals erred in *Colorado*

and to hold that FERC was without jurisdiction to approve GRI expenses as a part of the wholesale rate paid by gas retail companies including WGL. Review of the rulings of FERC is vested by statute in the United States Court of Appeals, not this court. *See* 15 U.S.C. § 717r(b) (1976).
Id. at 386.

With reference to the issue that *was* properly before the court below, the decision of the court turned, not upon the matters raised in the Supplementary Memorandum, but upon decisions of this Court delineating the proper roles of state and federal agencies in the regulation of the natural gas industry and pertinent state supreme court precedents requiring state agencies to give effect to FERC decisions:

> The issue before us is whether the Commission erred in disallowing the increased GRI charges as reasonable operating expenses on the grounds that the above appeal was pending at the time of the Commission's decision. We hold that it did. It is well settled that the Natural Gas Act provides for exclusive federal regulation of interstate wholesales of natural gas. *See Northern Natural Gas Company* v. *State Corporation Commission of Kansas*, 372 U.S. 84 (1963); *Illinois Natural Gas Company* v. *Central Illinois Public Service Commission*, 314 U.S. 498 (1942). State and local commissions have no authority, therefore, to inquire into the reasonableness of wholesale rates, but must allow them as reasonable operating expenses. *See, e.g., Citizens Gas Users Association* v. *Public Utilities Commission of Ohio*, 165 Ohio St. 536, 138 N.E.2d 383 (1956); *City of Chicago* v. *Illinois Commerce Commission*, 13 Ill.2d 607, 150 N.E.2d 776 (1958); *United Gas Corp.* v. *Mississippi Public Service Commission*, 127 So.2d

404 (Miss. 1961). [Footnote omitted]
Id., 452 A.2d at 385-86.[3]

In reaching its conclusion on the pertinent issue, the court below did *not* rely on the *Colorado* case as controlling, as alleged by Petitioner herein. (Petition, p. 10). Rather, the court found that a final administrative order in which the FERC exercises its rate review authority is binding and fully effective, *regardless* of the pendency of a challenge to that order:

> In the instant case, the Commission chose to disregard a final FERC order approving wholesale rates on the ground that FERC's jurisdiction had been challenged by another utility commission in a petition for judicial review of the order. The Commission ignored the fact that in the absence of a stay the FERC order, as a final agency order, was fully in effect during proceedings for review. *Jupiter Corp.* v. *Federal Power Commission*, 137 U.S.App.D.C. 295, 303, 424 F.2d 783, 791 (1969), *cert. denied*, 397 U.S. 937 (1970); *Ecee, Inc.* v. *Federal Power Commission*, 526 F.2d 1270, 1274 (5th Cir.), *cert. denied*, 429 U.S. 867 (1976).
> *Id.*, 452 A.2d at 386.[4]

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[3] With reference to the obligation of state and local commissions to accept FERC-approved wholesale rates as reasonable operating expenses for retail ratemaking purposes, see also: *Public Service Company of Colorado* v. *Public Utilities Commission of the State of Colorado*, 644 P.2d 933 (Colo. S.Ct. 1982); and *Narragansett Electric Co.* v. *Burke*, 381 A.2d 1358 (R.I.S.Ct. 1977), cert. den. 435 U.S. 972, 98 S.Ct. 1614 (1978). The *Public Service Company of Colorado* case is particularly apposite in that the court held expressly that the GRI funding unit component of wholesale rates must properly be recognized as a reasonable operating expense. *Id.* at 940.

[4] This conclusion is fully in keeping with the pronouncements of this Court on the matter of federal preemption. In *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251,

Petitioner's application for rehearing in the court below was denied on January 21, 1983, and its motion for stay of the mandate below was denied on March 3, 1983. The instant Petition for Writ of Certiorari was filed on April 11, 1983.

II

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals' refusal in the proceeding below to pass judgment on the merits of a final FERC order approving GRI's R&D program and funding unit properly gave effect to the will of Congress, as expressed in Section 19(b) of the Natural Gas Act.[5] That section vests exclusive authority to review final orders of the FERC in the United States circuit courts of appeals. Petitioner's attempt to force the issue of the FERC's jurisdiction before this Court constitutes an effort to sustain its improper collateral attack upon a final

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71 S.Ct. 692, 695 (1951), this Court stated, with reference to the Federal Power Commission's "exclusive powers" to prescribe rates under the parallel ratemaking provisions of the Federal Power Act, that a purchasing company "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." The Court has characterized the operative ratemaking provisions of the Natural Gas Act as "substantially identical" to the ratemaking provisions of the Federal Power Act, *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353, 76 S.Ct. 368, 371 (1956), and has made clear that the "filed rate doctrine" enunciated in *Montana-Dakota* is equally applicable with reference to rates accepted or prescribed by the FERC under the Natural Gas Act. *Arkansas Louisiana Gas Co.* v. *Hall*, ___ U.S. ___, 101 S.Ct. 2925, 2930 (1981).

[5] 15 U.S.C. § 717r(b).

order of the FERC that has been affirmed through the prescribed method of judicial review.

Petitioner makes two arguments for the proposition that judicial review, in direct contravention of Section 19(b) of the Natural Gas Act, is appropriate in this case. Neither argument is sound.

First, Petitioner argues that state supreme courts (e.g., the District of Columbia Court of Appeals) must be permitted to address the issue of the FERC's jurisdiction to act upon GRI's annual applications. Petitioner contends that refusal by the court below to rule on this issue constitutes good cause for a grant of its Petition because, given the District of Columbia Circuit's alleged "monopoly" over review of the issue, an inter-circuit conflict is not possible. Therefore, judicial review by state supreme courts, in contravention of the express terms of Section 19(b) of the Natural Gas Act, must be permitted in order to facilitate a conflict.

Even if Petitioner's premise concerning exclusivity of venue were accepted as valid, it would not constitute a sufficient basis for contravening the express provisions of Section 19(b). Moreover, there is an even more plausible alternative interpretation of the applicable venue provisions that does not result in a conclusion of exclusive venue.

Second, petitioner alleges that the *Colorado* opinion conflicts with earlier decisions of the District of Columbia Circuit, and that the conflict must be resolved by this Court.

However, the United States Court of Appeals expressly found, in *Colorado*, that its opinion is consistent with the prior decisions of that court. Even if the existence of a conflict could be established, it would be irrelevant to the

pertinent issues in the proceeding below since the court did not rely on *Colorado* as controlling in its disposition of those issues.

III

ARGUMENT

This is the second occasion upon which Petitioner has addressed, to this Court, the question as to whether the FERC, in its Opinion No. 64, *supra*, exceeded its jurisdiction under the Natural Gas Act by approving GRI's R&D program and permitting the cost of that program to be recovered through the rates of natural gas companies that are subject to the FERC's regulatory jurisdiction. Having failed in its first attempt, Petitioner is now seeking to force this issue into the present proceeding in direct contravention of the exclusive jurisdiction of the United States circuit courts of appeals. The issue presented here was not properly before the court below and, consequently, has not been properly brought before this Court. The Petition for Writ of Certiorari, therefore, should be denied.

A. Jurisdiction To Review Final Orders Of The FERC Under The Natural Gas Act Resides Exclusively In The United States Circuit Courts Of Appeals

The FERC's annual review of GRI's R&D program is carried out under Section 4 of the Natural Gas Act[6] as an exercise of the FERC's jurisdiction to regulate the rates charged by natural gas companies for the transportation and sale for resale of natural gas in interstate commerce. Congress has prescribed a specific and exclusive process for judicial review of such exercises of authority. As this

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[6] 15 U.S.C. § 717c.

Court expressly recognized in *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497, 75 S.Ct. 467, 470 (1955), "[t]he Natural Gas Act prescribes explicitly the procedure to be followed by any person seeking judicial review of an order of the Federal Power Commission."

More specifically, under Section 19(b) of the Natural Gas Act, the authority to review final orders of the FERC resides exclusively in the United States circuit courts of appeals. That section provides, in pertinent part, as follows:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order *in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia*, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition *such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification* as provided in sections 346 and 347 of Title 28. [Emphasis added]

Parties who have properly exhausted their administrative remedies before the FERC are thus entitled to take their grievances before an appropriate United States circuit court of appeals, which shall have "exclusive" jurisdiction.

Where Congress has thus prescribed a particular method of review, it is beyond question that the prescribed procedure is exclusive. *Whitney National Bank* v. *Bank of New Orleans and Trust Co.*, 379 U.S. 411, 421-22, 85 S.Ct. 551, 558 (1965); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 335-37, 78 S.Ct. 1209, 1218-19 (1958). *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-50; 58 S.Ct. 459 (1938). In the instant case, however, Petitioner has ignored the clear scheme of judicial review prescribed by Congress. Instead, Petitioner has fashioned its own novel method by which to bring an exercise of FERC jurisdiction before this Court. First, Petitioner brought before the court below a legal issue, i.e., the FERC's jurisdiction with respect to GRI. Then, after that court summarily, and quite properly, refused to address the matter, Petitioner approached this Court for a writ of certiorari under color of 28 U.S.C. § 1257(3).

GRI submits that Petitioner's method of bringing its "question" before this Court is an obvious attempt to circumvent the exclusive process of review mandated by Congress, and constitutes a collateral attack upon a final order of the FERC as affirmed by the United States Court of Appeals for the District of Columbia Circuit in *Public Utilities Commission of the State of Colorado* v. *FERC*, *supra*. The Court should not countenance such a subversion of orderly judicial process.

In this regard, the *City of Tacoma* case, *supra*, is particularly instructive. The Federal Power Commission, in an exercise of its preemptive powers under the Federal Power Act, had issued a final order. After administrative procedures were exhausted, the order was appealed to a United States Circuit Court of Appeals, which affirmed the FPC's action. A writ of certiorari from this Court was sought and denied.

A state court proceeding was then initiated in which the state supreme court ultimately rendered an opinion that was inconsistent with the FPC's order. Upon writ of certiorari to the state supreme court in the latter proceeding, this Court held that the state court had failed to properly recognize the exclusivity of United States circuit court of appeals review under Section 313(b) of the Federal Power Act,[7] which is substantially identical to Section 19(b) of the Natural Gas Act.[8] This Court stated:

> This statute is written in simple words of plain meaning and leaves no room to doubt the congressional purpose and intent. It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. Cf. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388, 66 S.Ct. 553, 554, 90 L.Ed. 739. *So acting, Congress in § 313(b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders. Safe Harbor Water Power Corp.* v. *Federal Power Comm.*, 3 Cir., 124 F.2d 800, 804, certiorari denied 316 U.S. 663, 62 S.Ct. 943, 86 L.Ed. 1740. It there provided that any party aggrieved by the Commission's order may have judicial review, upon all issues raised before the Commission in the motion for rehearing, by the Court of Appeals which "shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part," and that "[t]he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of

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[7] 16 U.S.C. § 825*l*(b).

[8] In *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 38, 84 S.Ct. 1105, 1108 (1964), this Court acknowledged that Section 19(b) of the Natural Gas Act was, in fact, derived from Section 313(b) of the Federal Power Act.

> the Commission, *shall be final*, subject to review by the Supreme Court of the United States upon certiorari or certification * * *." (Emphasis added.) It thereby necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review. *Hence, upon judicial review of the Commission's order, all objections to the order,* to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, *must be made in the Court of Appeals or not at all.* [Footnote omitted; emphasis added]
> *City of Tacoma, supra*, 357 U.S. at 335-36, 78 S.Ct. at 1218-19.

When the court below refused to entertain the "issue" that Petitioner had thrust before it in the Supplementary Memorandum, it was simply giving effect to the fact that Congress has, in Section 19(b) of the Natural Gas Act, prescribed an *exclusive* mode of review for final FERC orders.

B. Petitioner's Justifications For Ignoring The Lawful Mode Of Judicial Review Of FERC Orders Are Without Merit

1. Petitioner's assertion of the impossibility of an inter-circuit conflict is both insufficient and unfounded

Petitioner attempts to justify its self-implementing approach to Supreme Court review on the grounds that *only* the United States Court of Appeals for the District of Columbia Circuit could ever directly review the question of the FERC's jurisdiction with respect to GRI. Given the District of Columbia Circuit's monopoly over such review, argues Petitioner, there could never be an inter-circuit conflict on the question of FERC jurisdiction that would warrant substantive resolution by this Court. Petitioner concludes that, unless state supreme courts (e.g., the District of Columbia Court of Appeals) are permitted

to address the question, eventual review by this Court would be foreclosed. (Petition, pp. 6, 12-13).

Petitioner's first justification is thus premised on the exclusivity of review by the District of Columbia Circuit. GRI submits that, even if this premise were true, it would not provide a sufficient basis for ignoring the prescribed method of review. Only Congress has the power to authorize a change in its express mandate.

Moreover, assuming, *arguendo*, that the lack of opportunity to challenge the FERC's jurisdiction in another circuit could provide an acceptable rationale for ignoring Section 19(b) of the Natural Gas Act, Petitioner has failed to demonstrate that such a lack of opportunity exists. There is an even more plausible alternative interpretation of the applicable law that belies the validity of Petitioner's rationale.

As noted above, Section 19(b) provides that an appeal from a final FERC order may be lodged "in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . . ." In *FPC* v. *Texaco, Inc.*, *supra*, this Court stated, with reference to venue under Section 19(b), that the above language allows for three possibilities: (1) the circuit encompassing the state within which the natural gas company in question was incorporated; (2) the circuit within which the natural gas company in question has its principal place of business; or (3) the District of Columbia Circuit. *Id.*, 377 U.S. at 39, 84 S.Ct. at 1109.

Petitioner's exclusivity theory is based on the concept that GRI is not a "natural gas company" and therefore the alternative venue provisions of Section 19(b) do not app-

ly. However, the United States Court of Appeals for the District of Columbia Circuit held in *Public Utilities Commission of the State of Colorado* v. *FERC*, *supra*, that GRI stands in an agency relationship with its 29 member interstate pipeline companies. *Id.*, 660 F.2d at 823-25. The FERC's annual approval of the GRI funding unit authorizes a change in the rates of every member natural gas company that is subject to the FERC's jurisdiction.[9] What would thus entail 29 separate rate proceedings in the absence of GRI is thereby accomplished in a much more efficient manner through the annual review of GRI's program and funding unit.

Since, for the purposes of the FERC's annual review, GRI stands, as agent, for its interstate pipeline company members, those members' customers are affected as though the FERC's determination had been made in individual rate proceedings. Thus, permissible venue for review of an FERC action involving GRI may include *any* circuit where the member pipeline companies to which the order "relates" are incorporated or have their principal places of business.

WGL purchases natural gas from two interstate pipeline companies, Columbia Gas Transmission Corporation and Transcontinental Gas Pipeline Corporation, both of which are members of GRI. The above interpretation would open up venue in the Third, Fourth, and Fifth Circuits, where these suppliers are incorporated or have their principal places of business, as well as the District of

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[9] The FERC determined, in its very first annual review of GRI's R&D program, that GRI's members would automatically become parties to the annual proceedings. *See* Opinion No. 11, *Gas Research Institute*, Docket No. RM77-14, 2 F.E.R.C. ¶ 61,259 at 61,638-39 (1978).

Columbia Circuit. Therefore, the statutory provision that Petitioner has relied upon does not preclude review in more than one circuit.

2. Petitioner's contention that the *Colorado* decision conflicts with other decisions of the District of Columbia Circuit is both irrelevant to the disposition of the case below and erroneous

Petitioner's second justification for its unorthodox mode of pursuing Supreme Court review is based on an alleged *intra*-circuit conflict among certain opinions of the District of Columbia Circuit. Petitioner asserts that the opinion in *Public Utilities Commission of the State of Colorado* v. *FERC*, *supra*, is directly inconsistent with that court's prior opinions in *Office of Consumer's Counsel* v. *FERC* (the "*Great Plains*" case) 655 F.2d 1132 (D.C. Cir. 1980) and *Henry* v. *FPC*, 513 F.2d 395 (D.C. Cir. 1975), and that the conflict, regardless of the niceties of appellate jurisdiction, warrants resolution by this Court. (Petition, pp. 10-13).

GRI's response to these assertions is two-fold. First, even if the *Colorado* case *did* create an intra-circuit conflict in the District of Columbia Circuit, that fact would be irrelevant to disposition of the pertinent issues in the case below. As demonstrated in GRI's Statement of the Case (*supra*, pp. 5-6), the court below found that Petitioner was obligated to recognize the GRI funding unit component of wholesale rates as a reasonable operating expense, *regardless* of the fact that the issue of the FERC's jurisdiction with respect to GRI was pending before the United States Court of Appeals at the time Petitioner acted. The court's decision was based, not on *Colorado*, but upon the "filed rate" doctrine, as enunciated by this Court, and as consistently applied by state supreme courts. The court's sole reference to *Colorado* was for the

purpose of rejecting Petitioner's request that it find that opinion "in error" with respect to the issue of FERC jurisdiction. Such a proper refusal to usurp the exclusive power of review conferred by Congress upon the United States circuit courts of appeals cannot be turned on its head to provide the basis for a writ of certiorari.

Second, even assuming, *arguendo*, that the court below had relied on *Colorado* in rendering its opinion, and that the existence of an intra-circuit conflict could somehow legitimize contravention of Section 19(b) of the Natural Gas Act, it is clear from the face of the *Colorado* opinion that no such conflict exists. Without any expression of a dissenting view, the court demonstrated explicitly in *Colorado* that its opinion, therein, was fully consistent with its earlier opinions in *Great Plains* and *Henry:*

> The differences between the *Great Plains* case and this one are readily apparent. Unlike *Great Plains*, and the *Henry* case before it, . . . GRI does not here request from FERC certifications under Section 7 for its projects. On the contrary, only ratesetting for jurisdictional companies acknowledgedly within Section 4 jurisdiction is at issue here, and FERC's discretion and authority under the two sections are not necessarily coextensive . . . .
>
> * * *
>
> This panel, which includes one member who was on the *Great Plains* panel, has concluded *Great Plains* is not controlling under the facts of this case. In summary, we believe there is a difference between FERC's becoming an active participant in the building, financing and operation of a large scale commercial synthetic fuel operation which had little possibility of benefit to the ratepayer, and the various areas of research to be carried out here.
> *Id.*, 660 F.2d at 827-28.

Clearly, what Petitioner characterizes as a direct inconsistency with *Colorado* is not a conflict between panels of the District of Columbia Circuit. Rather, it amounts to nothing more than a self-serving and incorrect interpretation of that Circuit's earlier decisions.

The argument concerning the alleged intra-circuit conflict was raised before the District of Columbia Circuit prior to decision and on rehearing in the *Colorado* case, as well as before this Court on petition for writ of certiorari in that case. On none of these occasions, was the argument found to have any substance.[10]

IV

CONCLUSION

The question raised by Petitioner before this Court has no basis in the substantive disposition of the issues below, and constitutes a collateral attack upon a final order of the FERC that has been reviewed and affirmed in the manner prescribed by Congress. The interests of justice and orderly judicial process would be served by denial of the Petition herein.

WHEREFORE, Gas Research Institute respectfully requests this Court to deny the Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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[10] Even if Petitioner could establish the existence of an intra-circuit conflict, and could show that the conflict was relevant to the disposition of the proceeding below, there would still be insufficient grounds for granting a petition for a writ of certiorari. *See Davis* v. *United States*, 417 U.S. 333, 340, 94 S.Ct. 2298, 2303 (1974). Ordinarily, conflicts of that nature are to be resolved by the United States circuit court of appeals itself, sitting *en banc*.

that was filed by the Public Service Commission of the District of Columbia in this proceeding on April 11, 1983.

Respectfully submitted,

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